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NO. 07-654

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH JONES,

Petitioner,

vs.

ADAM JENNINGS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR THE STATES OF COLORADO, ALASKA, ARKANSAS, FLORIDA, HAWAII, IDAHO, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICI CURIAE 1
REASONS FOR GRANTING THE PETITION 4
I. The decision below conflicts with decisions of this Court and the majority of circuits as to whether a single case from another circuit can "clearly establish" the law for purposes of qualified immunity. 5
A. The decision conflicts with this Court's reasonable officer standard. 5
B. The First Circuit's opinion places it in the minority of circuits. 7
C. The majority of circuits adhere to this Court's precedent. 9
II. The alleged constitutional violation was not "so obvious" as to be clearly established in the absence of relevant on point precedent. 12
A. Officer Jones's conduct was, at worst, within the hazy area between excessive and acceptable force. 12
B. If multiple judges cannot agree on the state of the law, the law is not clearly established. 18
CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 6, 16
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 3
Boyd v. Benton County, 374 F.3d 773 (9th Cir. 2004)....8, 12
Breen v. Texas A&M Univ., 485 F.3d 325 (5th Cir. 2007) 10
Brokaw v. Mercer County, 235 F.3d 1000 (7th Cir. 2000) 13, 15
Brosseau v. Haugen, 543 U.S. 194 (2004).....1, 14, 17, 18
Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990) 9
Buckley v. Rogerson, 133 F.3d 1125 (8th Cir. 1998).....8
Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000) 8
Evans v. Stephens, 407 F.3d 1272 (11th Cir. 2005) 11
Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004) 10
Guffey v. Wyatt, 18 F.3d 869 (10th Cir. 1994) 10
Hamilton v. Cannon, 80 F.3d 1525 (11th Cir. 1996).....11
Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994).....11
Harlow v. Fitzgerald, 457 U.S. 800 (1982).....6, 13
Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991).....10
Hope v. Pelzer, 536 U.S. 730 (2002) 2, 13, 17
Konop v. Northwestern Sch. Dist., 26 F.Supp.2d 1189 (D. S.D. 1998).....8
Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002).....16
Lynch v. City of Boston, 180 F.3d 1 (1st Cir. 1999) 7
Malley v. Briggs, 475 U.S. 335 (1986).....6, 12
Marsh v. Butler County, 268 F.3d 1014 (11th Cir. 2001)....11
Maryland v. Garrison, 480 U.S. 79 (1987) 2
McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992).....8, 15

TABLE OF AUTHORITIES

PAGE

Medina v. City & County of Denver, 960 F.2d 1493 (10th Cir. 1992) 10
Mitchell v. Forsyth, 472 U.S. 511 (1985) 5
Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171 (6th Cir. 1988) 10
Pabon v. Wright, 459 F.3d 241 (2d Cir. 2006) 9
Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000) 15, 17
Saucier v. Katz, 533 U.S. 194 (2001) 2, 6, 14, 16, 17
Smith v. Maddox, 127 F.3d 1416 (11th Cir. 1997) 11, 12
Sorrels v. McKee, 290 F.3d 965 (9th Cir. 2002) 8
Tennessee v. Garner, 471 U.S. 1 (1985) 17
Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 10
United States v. Lanier, 520 U.S. 259 (1997) 13
Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) 11, 14
Williams v. Consolidated City of Jacksonville, 341 F.3d 1261 (11th Cir. 2003) 13
Willingham v. Loughnan, 321 F.3d 1299 (11th Cir. 2003) 14, 15
Wilson v. Layne, 526 U.S. 603 (1999) 2, 5, 7, 18

Constitutions

U.S. Const. amend. IV 4, 14

Statutes

42 U.S.C. § 1983 ..... 1, 3

INTEREST OF THE AMICI CURIAE[1]

State officers and employees are frequently defendants in actions brought under 42 U.S.C. § 1983. Thus, Amici States have a critical interest in how the federal courts determine whether the law concerning a constitutional right was "clearly established" for purposes of the qualified immunity analysis those cases often involve.[2] Because the decision of the court of appeals exacerbates a split in the circuits as to whether the holding of one court of appeals can be said to clearly establish governing law for state employees even in other circuits, Amici States have an interest in this Court's settling that question.

A public employee is entitled to qualified immunity unless a plaintiff can show that the constitutional right alleged to have been violated was "clearly established" at the time of the alleged violation, not "at a high level of generality," but "in a more particularized, and hence more relevant, sense," *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam) (quotation omitted). A right is only clearly established when a factually similar precedent "squarely governs" the case at issue, *id.* at 201, or when the constitutional violation was so

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

[2] While Amici States disagree with the First Circuit's holding that Officer Jones' conduct constituted excessive force, (App. 30-31), this amicus brief focuses solely on the First Circuit's errors in the qualified immunity analysis.

"obvious" that "general tests . . . 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199. These rules serve the fundamental proposition that the qualified immunity inquiry must focus on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

As discussed in more detail below, the majority of circuits have recognized that a reasonable officer cannot be expected to know the holdings of every court in the country. They have therefore followed this Court's analysis, looking only to binding precedent from this Court and the controlling jurisdiction or a clear consensus among the circuits.

The First Circuit, however, joined a growing minority of courts in holding that an alleged constitutional right can be "clearly established" by a single case from another circuit. Under this reasoning, the standard is not whether a defendant had "fair warning," *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002), but whether any court anywhere has suggested that similar conduct is impermissible.

The minority's approach is inconsistent with the purpose of qualified immunity, which is "to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests." *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). It therefore is also inconsistent with this Court's decisions laying out the "reasonable officer" standard, including *Hope*, *Saucier*, *Wilson v. Layne*, 526 U.S. 603 (1999).

Amici States have a strong interest in ensuring that those cases, which are the foundation of the qualified immunity defense that protects public employees at all levels of government from potential liability, are not undermined. It is critical to note that the interested parties to this case are not only law enforcement personnel. Claims brought under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), affect all local, state, and federal government employees, from road maintenance crews to medical personnel to food service workers. Each of these employees is subject to liability under § 1983 or *Bivens* and is entitled to the protections of qualified immunity.

Amici States fear the First Circuit's decision, if allowed to stand, will negatively affect public employees throughout the country by making them indecisive, or even reluctant to act at all, in uncertain situations. Public employees who must make decisions quickly, particularly law enforcement officers in an arrest situation, should be able to rely on their training and on case law from this Court and their own jurisdiction. Officers in the heat of a violent arrest cannot be expected to know that a case from a different jurisdiction across the county found that what he or she was doing violated a constitutional right. These are the very situations in which qualified immunity is needed.

REASONS FOR GRANTING THE PETITION

In the decision below, the First Circuit held that a single case from another circuit "clearly established" the law in the First Circuit such that Officer Jones had "notice" that his conduct was unconstitutional. (App. 32). Alternatively, the court held that "Jones' conduct was such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful." (App. 33).

Both of the First Circuit's holdings regarding "clearly established law" conflict with this Court's qualified immunity jurisprudence as well as qualified immunity decisions from other circuits. Both holdings are likely to create confusion and uncertainty. Therefore, Amici States urge this Court to grant Jones' petition and reverse the First Circuit's decision. Amici States further urge this Court to resolve a deepening circuit split regarding when case law from other circuits or state courts can clearly establish the law for qualified immunity purposes.

I. The decision below conflicts with decisions of this Court and the majority of circuits as to whether a single case from another circuit can "clearly establish" the law for purposes of qualified immunity.

A. The decision conflicts with this Court's reasonable officer standard.

While this Court has never explicitly held when courts can look to other courts in searching for factually analogous cases, the decision in *Wilson v. Layne*, 526 U.S. 603 (1999), provides powerful guidance. In *Wilson*, this Court rejected a plaintiff's argument that a case from the Sixth Circuit could clearly establish the law in the Fourth Circuit. *Id.* at 616-17. In doing so, this Court reiterated that a right is "clearly established" only when the plaintiff is able to cite to either "cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful." *Id.* at 617.

The First Circuit did not follow either of these directives in the present case. Instead, the First Circuit held that a lone case from the Eleventh Circuit–distinguishable on its facts–clearly established the law for an officer acting in the First Circuit.

Qualified immunity was created to protect government officials from the onus of trial and other burdens of litigation. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Because of this mandate, the

doctrine of qualified immunity is broadly interpreted to shield from liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Before *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity contained both an objective and a subjective component. *Id.* at 815. However, because of the subjective component, qualified immunity was often ineffective in resolving insubstantial suits against government officials before trial. *Id.* at 815-16. In an attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of their duties as a result of baseless claims, this Court adopted an objective test to determine whether qualified immunity applies. Thus, when government officials are performing discretionary functions, they will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

When determining whether the right was "clearly established," the "relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. In other words, although there need not be an indistinguishable case on point, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The First Circuit's decision should be reviewed because it conflicts with the principles behind these cases, which are the very foundation on which qualified immunity rests. At the very least, this case presents the Court with the opportunity to definitively settle whether a single case can establish the consensus among circuits that *Wilson* requires. *See Wilson*, 526 U.S. at 617.

B. The First Circuit's opinion places it in the minority of circuits.

Not only is the First Circuit's holding contrary to this Court's decision in *Wilson*, but it represents a dramatic shift in First Circuit jurisprudence. Indeed, the First Circuit had previously held that "a single decision from another court of appeals applying its own precedents is plainly insufficient to meet the requirement that in the light of pre-existing law the unlawfulness must be apparent to a reasonable government official." *Lynch v. City of Boston*, 180 F.3d 1, 14 (1st Cir. 1999) (quotation omitted).

The First Circuit's new position on this question places it among a growing minority of circuit courts that will rely on out-of-circuit law to determine whether a right is "clearly established." Along with the First Circuit, the Seventh, Eighth, and Ninth Circuits regard sister circuits' opinions as controlling precedent for purposes of qualified immunity.

The Seventh Circuit has held that courts can examine "all relevant sources of guidance to the law" when deciding whether a right has been clearly

established. *Burgess v. Lowery*, 201 F.3d 942, 944-46 (7th Cir. 2000); *see also McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992) (holding that plaintiff may rely on Third Circuit precedent to demonstrate that law was clearly established).

The Eighth Circuit also takes a "broad view" of what constitutes clearly established law. *See Buckley v. Rogerson*, 133 F.3d 1125, 1129-31 (8th Cir. 1998) (relying on district court decisions from three other circuits); *Konop v. Northwestern Sch. Dist.*, 26 F.Supp.2d 1189, 1194-96 (D. S.D. 1998) (law was clearly established despite no similar case from Supreme Court, Eighth Circuit, any district court within the Eighth Circuit, or the South Dakota Supreme Court).

Similarly, the Ninth Circuit " 'look[s] to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts.' " *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004). Even "unpublished decisions of district courts" can clearly establish the law in the Ninth Circuit. *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002). This approach, where a single case from an out-of-circuit court could constitute "clearly established" law would, if followed to its logical end, require public employees to become cognizant of the decisions of at least 158 courts[3] across the country, including the

[3] Including this Court, twelve federal circuit courts of appeals, ninety-four federal district courts, and supreme courts of fifty states and the District of Columbia.

federal courts of appeals, federal district courts, and state supreme courts.

C. The majority of circuits adhere to this Court's precedent.

The remaining circuits look only to controlling authority, or a clear consensus of persuasive authority if one exists, when determining whether the law is clearly established for purposes of qualified immunity. For example, the Second Circuit has held that when there is no Supreme Court or Second Circuit case law on point, "the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit." *Pabon v. Wright,* 459 F.3d 241, 255 (2d Cir. 2006). The Third Circuit has explained that "a lone district court case from another jurisdiction cannot sufficiently" establish a constitutional right "to enable reasonable officials to anticipate [that] their conduct [might] give rise to liability for damages." *Brown v. Grabowski,* 922 F.2d 1097, 1118 (3d Cir. 1990) (internal quotation marks and citations omitted).

The Fourth Circuit has reasoned that reliance on the opinions of sister circuits "merely underscores the lack of Fourth Circuit and Supreme Court law establishing the right for which [plaintiff] contends." *Snyder v. Ringgold,* 133 F.3d 917 (Table), 1998 WL 13528 *3 (4th Cir. 1998) (unpublished). Likewise, the Fifth Circuit has held that its sister circuits' case law is "insufficient" when determining whether a right is clearly established in that circuit. *Breen v.*

Texas A&M Univ., 485 F.3d 325, 339-40 (5th Cir. 2007).

The Sixth Circuit has recognized that for other courts of appeals' decisions to apply, the opinions "must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct . . . would be found wanting." *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

"[F]or the law to be clearly established [in the Tenth Circuit], there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). The Tenth Circuit held that the law may not be "clearly established" even when two sister circuits and two district courts had held it was. *See Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1118 (10th Cir. 2004) (en banc), *rev'd on other grounds*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Guffey v. Wyatt*, 18 F.3d 869, 872 (10th Cir. 1994) (refusing to consider state law decisions in determination of whether law was clearly established); *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991) (holding that two cases from sister circuits did not clearly establish a right).

The Eleventh Circuit will only consider precedent binding on the relevant public official; that is,

decisions of the U.S. Supreme Court, Eleventh Circuit, or highest court of the state where the case arose. *See Evans v. Stephens*, 407 F.3d 1272, 1282 n.14 (11th Cir. 2005). Out-of-circuit holdings are "immaterial" as to whether the law is clearly established in the circuit. *Vinyard v. Wilson*, 311 F.3d 1340, 1348 n.11 (11th Cir. 2002). "We do not expect public officials to sort out the law of every jurisdiction in the country." *Marsh v. Butler County*, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001); *see also Hamilton v. Cannon*, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996) (even though a Seventh Circuit decision strongly supported Plaintiff's argument that the law was clearly established, "Seventh Circuit decisions cannot clearly establish the law for purposes of qualified immunity in this circuit."). "Even if out-of-circuit decisions could clearly establish the law in this Circuit, a distinguishable, non-binding case does not clearly establish anything." *Hansen v. Soldenwagner,* 19 F.3d 573, 578 n.6 (11th Cir. 1994).

In contrast to the Eleventh Circuit's warning in *Hansen*, the First Circuit chose to rely solely on a distinguishable, non-binding case, *Smith v. Maddox*, 127 F.3d 1416 (11th Cir. 1997), in holding that Jones violated clearly established law. In *Smith*, a police officer was denied qualified immunity after he broke the arm of a suspect who, though he had previously run from the officer, had since "docilely submitted to arrest." *Id.* at 1418. Unlike the arrest in *Smith*, Jennings violently resisted arrest for several seconds. He kicked Jones. At the time Jones allegedly increased his use of force, Jennings' hand was hidden under his body, thus preventing officers from cuffing him. Quite simply, the readily

distinguishable, non-binding decision in *Smith* could not have provided Jones with "fair warning" that his conduct was unconstitutional.

The minority position, which now includes the First Circuit, risks rendering the doctrine of qualified immunity superfluous, since it would be impossible, from a purely practical standpoint, for the average public servant to become well-versed in the law of so many courts from across the country. Public employees cannot fairly be required to be legal scholars. But if public employees are to be held liable for knowing "whatever decisional law is available," *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004), that responsibility should be established by this Court, not the lower courts of appeal.

II. The alleged constitutional violation was not "so obvious" as to be clearly established in the absence of relevant on point precedent.

A. Officer Jones's conduct was, at worst, within the hazy area between excessive and acceptable force.

Qualified immunity is intended to shield from liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In only "rare cases" will a violation "be so egregious that the Constitution . . . on its face may be sufficient to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law." *Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261,

1270 (11th Cir. 2003) (quotation omitted). Contrary to the First Circuit's decision, this is not one of those rare cases.

Where "the [constitutional] violation was so obvious that our own . . . cases gave [officers] fair warning that their conduct violated the Constitution," the court can "conclude that the [officers'] conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Hope*, 536 U.S. at 741-42 (quoting *Harlow*, 457 U.S. at 818). For example, while "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery[,] it does not follow that if such a case arose, the officials would be immune from damages . . . liability." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quotation omitted).

Where "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question" such that a reasonable officer would be on notice that his or her conduct was unlawful, a prior case on point is not necessary. *Lanier*, 520 U.S. at 271. *See also Brokaw v. Mercer County*, 235 F.3d 1000, 1023 (7th Cir. 2000) ("some governmental actions are so clearly beyond the pale that a reasonable person should have known of their unconstitutionality even without a closely analogous case").

The First Circuit's decision extends this principle beyond its established bounds and rationale.

In *Brosseau*, this Court held that a police officer who shot a fleeing suspect was entitled to qualified immunity due to lack of clearly established law. 543 U.S. at 200-01. This Court noted that general statements of law are particularly deficient, where, as here, the constitutional "area is one in which the result depends very much on the facts of each case." *Id.* at 201. Similarly, in *Saucier v. Katz*, this Court reversed the Ninth Circuit which had found that a right was clearly established based on the too-general proposition that "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier*, 533 U.S. at 202. As this Court explained, "that is not enough." *Id.* Instead, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 202.

"Officers facing split-second decisions in dangerous or life-threatening situations are seldom provided with fair warning, notice or guidance by a general requirement of 'reasonableness.' " *Willingham v. Loughnan*, 321 F.3d 1299, 1303 (11th Cir. 2003). *See also Vinyard*, 311 F.3d at 1351 n.21 ("many broad principles of law in the Fourth Amendment context remain insufficient to give fair notice or warning").

"In the context of Fourth Amendment excessive force claims . . . generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to

qualified immunity." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). "[P]reexisting, factually similar cases are . . . usually . . . needed to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights." *Willingham*, 321 F.3d at 1303.

Without such precedents, the officer's conduct must be "so severe that a reasonable person would have understood that he was violating [the plaintiff's] constitutional rights." *Brokaw*, 235 F.3d at 1022. For example, in *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992), an officer was denied qualified immunity because "it should have been obvious" to any reasonable officer, even though "no precisely analogous case exists," that holding a gun to the head of a nine-year child and threatening to pull trigger was objectively unreasonable, especially where the child was not under arrest, was not a suspect, was not armed, was not attempting to evade officers, and was not posing any threat to the officer or the general community.

Similarly, in *Priester*, the Eleventh Circuit denied qualified immunity, despite a lack of particularized preexisting case law, to an officer who ordered his police dog to attack and repeatedly bite a burglary suspect after the suspect immediately submitted to police, complied with orders to get on the ground, did not attempt to flee or resist arrest, and did not pose a threat to officers. "No reasonable police officer could believe that this force was permissible given these straightforward circumstances." *Priester*, 208 F.3d at 927; *see also Lee v. Ferraro*, 284 F.3d 1188,

1199-1200 (11th Cir. 2002) (despite lack of prior case on point, officer was not entitled to qualified immunity because it was "obvious" that "slam[ming plaintiff's] head against the trunk [of a car] after she was arrested, handcuffed, and completely secured, and after any danger to the arresting officer as well as any risk of flight had passed" was "objectively unreasonable and clearly unlawful").

The qualified immunity inquiry must focus on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202, and "the information [he] possessed." *Anderson,* 483 U.S. at 641. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

In this case, it is undisputed that, seconds before his injury, Jennings had been actively resisting arrest by kicking at Officer Jones. It is also undisputed that Jennings' injury occurred before he was cuffed and while he was struggling on the ground with one hand held under his body. In such a situation, it cannot be said that every objectively reasonable officer in Jones' situation would have known that it was unconstitutional to increase the use of force against a suspect who had been kicking officers only seconds before and who, despite multiple orders to do so, had not produced both hands for handcuffing. Jones was using a control technique he learned at the police academy.

The fact-intensive nature of the First Circuit's analysis—the majority attempted to count the

seconds between when Jennings may have stopped kicking the officers and when his injury occurred—shows that, like *Brosseau*, "[t]he present case is far from the obvious one where . . . *Garner* alone offer[s] a basis for decision." *Brosseau*, 543 U.S. at 199. Consequently, the need for materially similar precedent is especially strong here. Contrary to the First Circuit's holding, a distinguishable Eleventh Circuit case cannot "squarely govern[]" this case. *Id.* at 201. At most, Jones's conduct, like the officer's in *Brosseau*, "fell in the 'hazy border between excessive and acceptable force.'" *Id.* (quoting *Saucier*, 533 U.S. at 206).

While "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope*, 536 U.S. at 741, the Court should clarify that *Hope* was not an invitation for courts to substitute their views for those of an "objectively reasonable officer" in the defendant's circumstances. Whether under the "general rule" requiring a prior case on point or the "narrow exception" where a constitutional violation is obvious, "pre-existing law must dictate, that is, truly compel (not just suggest or allow to raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances for qualified immunity to be unavailable to a defendant." *Priester*, 208 F.3d at 927.

In this case, at least eight officers, including an expert designated by both Jones and Jennings, testified at trial about Jennings' arrest. *Every* officer who was asked about Jones' conduct testified that

Jones acted reasonably. Where *every* officer testified that Jones' conduct was reasonable, Jones should be entitled to qualified immunity.

B. If multiple judges cannot agree on the state of the law, the law is not clearly established.

Thus far, four federal judges have researched and opined on whether Officer Jones' conduct violated clearly established law such that he is not entitled to qualified immunity.[4] Two judges would have granted Jones qualified immunity because he did not violate clearly established law. (App. 55-63; App. 89-91). Two other judges held that the law was clearly established and denied qualified immunity. (App. 32-36). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

A right is only clearly established when it no longer lies in that "hazy" area of constitutional issues that might be "reasonably misapprehend[ed] by a law enforcement officer at the scene." *Brosseau*, 543 U.S. at 198. Here, multiple judges could not agree on whether the law was "clearly established" – even with the luxury of hindsight, extensive research, and quiet deliberation. As such, the issue appears to remain in that "hazy" area of constitutional law which officers might "reasonably misapprehend" in the midst of a chaotic arrest.

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[4] Judge Torres of the United States District Court for the District of Rhode Island, and Judges Lipez, Torruella, and Lynch of the First Circuit Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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